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JOURNAL

OFFICE OF LEGISLATIVE COUNSEL

Friday - 16 April 1976

1. (Unclassified - JMD) LIAISON In reply to his request yesterday, called Alexander Gabriels, in the office of the Vice President, and informed him I had arranged a personnel interview for him on 20 April at 2:30 p.m. with [redacted]

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2. (Unclassified - WPB) LEGISLATION Called Donald Moorehead, Chief Minority Counsel, Senate Finance Committee, to discuss the possible provision in the Tax Reform Act of 1976 which would require the public disclosure of Internal Revenue Service private letter rulings. Moorehead said he would be interested in discussing the Agency's interests in the near future.

3. (Unclassified - WPB) LEGISLATION Called Ed Braswell, Counsel, Senate Armed Services Committee, concerning the draft of a letter to Senator Howard Cannon (D., Neb.), Chairman of the Senate Rules Committee, on S. Res. 400. He said that he had no problems with the draft, except that he thought we might wish to put something on on the authorization problem.

4. (Unclassified - SK) EMPLOYMENT At the request of Mildred Wood, in the office of Representative Charles A. Mosher (R., Ohio), the Office of Personnel was asked to send application forms and a brochure on employment to constituent, [redacted]

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GEORGE L. CARY
Legislative Counsel

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cc:
O/DCI
O/DDCI
[redacted]
Ex. Sec.
DDA DDI DDS&T

[redacted]
Mr. Thuermer
Mr. Parmenter
IC Staff
EA/DDO Compt

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13. (Unclassified - WPB) LEGISLATION Called George Gilbert, OMB, and told him we had no problems with State Department's proposed report on H.R. 8388, the Official Accountability Act of 1975.

14. (Unclassified - DFM) LEGISLATION Received a call from Bob Carlstrom, OMB, who asked if there was any particular priority on our letters to the two Judiciary Committees regarding the use of the polygraph. I replied that I saw no urgency as the matter was not moving in either Committee, but that the issue was so important to us that we wanted to be on record with the Committees. Carlstrom said he would try to get the letters cleared by the end of April.

STAT [redacted]

GEORGE L. CARY
Legislative Counsel

cc:
O/DCI
O/DDCI
STAT [redacted]
Ex. Sec.
Mr. Thuermer
Mr. Parmenter
STAT [redacted]
DDI DDA DDS&T
IC Staff
EA/DDO
Comptroller

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OLC 76-0702

March 12, 1976

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
National Security Council
Central Intelligence Agency

SUBJECT: State Department proposed report on H.R. 8388, a bill "To amend title 18 of the United States Code to provide a code of accountability and liability for Government officials engaged in making and implementing national security policy."("The Official Accountability Act of 1975.")

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than April 9, 1976

Questions should be referred to [redacted] (103x4710) or to George R. Gilbert the legislative analyst in this office.

James F. C. Hyde, Jr. for
Assistant Director for
Legislative Reference

Enclosures

Comments from G. Clarke 4/8/76

DEPARTMENT OF STATE

Washington, D.C. 20520

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

You have asked for the comments of the Department of State on H.R. 8388, A Bill "To amend title 18 of the United States Code to provide a code of accountability and liability for Government officials engaged in making and implementing national security policy."

The Bill is in two titles. Title 1 would amend title 18 of the United States Code by adding a new chapter entitled "National Security Crimes". It would make "any officer or employee of the United States including any member of the Armed Forces of the United States," subject to the provisions of the new chapter. It creates new substantive criminal provisions based upon the laws of war. It also includes a definition of the defense of superior orders and gives to the National Security Solicitor exclusive authority to prosecute violations of the chapter. Title 2 would create the Office of National Security Affairs and the post of the National Security Solicitor, who would be appointed by the President for 15 years but could only be removed from office by the Congress. Title 2 also establishes the powers of the Solicitor.

The Department of State believes that this bill raises fundamental Constitutional issues and should not be enacted. In our judgment, the creation of the Office of National Security Affairs and the National Security Solicitor, with powers as proposed in this bill, would violate the principle of separation of powers. Under our system of government enforcement of the law is an executive function. Article II, section 3 of the Constitution provides that the President "shall take care that the Laws be faithfully executed." The Supreme Court has recently held that the Federal Election Commission could not exercise many of its enforcement functions, Buckley v. Valeo, U.S. Supreme Court, January 30, 1976, 44 Law Week 4127. The Court concluded that "most of

the power conferred by the Act upon the Federal Election Commission can be exercised only by 'Officers of the United States'," 44 L.W. at 4170. The Court acknowledged that Congress has the authority to establish commissions and "Offices" to assist in those functions that Congress may carry out, but

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A law suit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the Laws be faithfully executed" Art. II section 3, 44 L.W. at 4168.

A leading case which confirmed that the matter of prosecution of crimes is wholly an executive function is United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied, 381 U.S. 935. See also Ponzi v. Ressenden, 258 U.S. 254 (1922) and the cases cited in United States v. Cox, supra.

The creation of the National Security Solicitor would remove the prosecution of crimes from the control of the executive because the Solicitor could be removed from office only by the Congress. He would be independent of the executive. This would be quite different from the case of the Special Watergate Prosecutor who was appointed by and was subject to removal by the President. Congress may limit the authority of the President to remove officers of the United States but only in the cases of independent regulatory agencies or other quasi-judicial bodies. Myers v. United States, 272 U.S. 52 (1926), Humphrey's Executor v. United States, 295 U.S. 602 (1935) and Wiener v. United States, 357 U.S. 349 (1958). This limitation does not seem appropriate in cases where the officers would be conducting prosecutions. Cf. Buckley v. Valeo, supra, 44 L.W. at 4168.

Furthermore we question whether Congress could, by legislation, remove the power to prosecute from the hands of the executive. It is doubtful that a legislative act could enable Congress to perform a function which the Constitution clearly assigns to the President, Buckley v. Valeo, supra. In this connection see also Springer v. Philippine Islands, 277 U.S. 189 (1927), in which the Supreme Court held that the legislative branch could have no hand in the appointment

of the board of directors of a public corporation. The Court viewed that as a divestiture of executive power by the legislative branch. We believe that this principle would not permit the Congress to divest the executive of its power to enforce the laws.

Even if the Constitutional defects could be corrected, we believe the enactment of this bill would be of dubious wisdom. The National Security Solicitor would have powers so broad that, if abused, those powers could prejudice national security and frustrate the formulation of foreign policy.

For example, the Solicitor could, under section 3106 (a), force disclosure from the executive branch (by grand jury if necessary, section 3104(a)) of the most secret contingency plans or weapons designs. Then, if he felt that these plans or designs might, under some circumstances, lead to a violation of the laws of war, he could, under section 3105, seek an order from a U.S. district court enjoining the executive branch from any further activity in those fields. Such an action would seriously disrupt the deliberative processes of the executive branch. It would be an intrusion into the confidentiality of the executive's decision-making process. The Supreme Court has recently recognized the "valid need for protection of communications between high Government officials and those who advise and assist them...certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." U.S. v. Nixon 683 U.S. 706, 707 (1974). Finally, it would require the federal courts to consider not only the law but also issues of foreign policy, a role they have traditionally and quite properly rejected.

The Office of National Security Affairs would be a new element in our scheme of government and we see no need to have such an office. We believe that the foreign policy of the United States has been and will be formulated and conducted within the bounds of international law. In the case of armed conflicts, extensive efforts are made within the Executive branch to insure that the conduct of United States armed forces is in accordance with the laws of war and that violations of those laws are punished. Recently the Department of Defense has adopted a number of directives aimed at further compliance with the law.

In addition to these fundamental objections to the bill, the Department of State believes that there are serious technical problems with the substantive crimes set forth in Title 1 of the bill. First, the acts which would be prohibited are only a partial list of acts which would be violations of the laws of war. The list is not a codification but rather is a list of general principles which are badly chosen and vaguely drafted. Second, some of those crimes which are listed differ from the traditional laws of war. For example, with respect to prisoners of war, this Bill would prohibit only murder, torture, using as hostages or for slave labor or confining in concentration camps (§ 2552(b)(1)). Yet the Bill would also incorporate the 1949 Geneva Conventions in section 2552(d)(1). The Geneva Conventions contain extensive detailed provisions for treatment of prisoners of war. Thus the bill creates obvious conflicts in the substantive provisions which a court would be expected to apply. Moreover, the adoption of a crime for waging "wars of aggression" would be troublesome because of the extraordinary difficulty associated with defining "aggression" and determining when one party to armed conflict is the aggressor. Indeed, the United Nations struggled for years with a definition of aggression and when the General Assembly finally adopted one in 1974, many states, including the United States, expressed concern about some of the provisions. Many legal scholars have criticized the crime of waging wars of aggression because of problems associated with definition and enforcement, and some have argued that it is not a matter which is justiciable by domestic courts. These problems are compounded by the Bill when it adds the crime of waging war in violation of a treaty or agreement.

In general, we believe that this attempted codification of war crimes is inadequate and must be fundamentally rewritten.

Congress has the power "to define and punish... offenses against the law of nations" (Article 1, section 8, clause 10, United States Constitution). Congress has

made the laws of war clearly a part of the Uniform Code of Military Justice (Articles 18 and 21). Military courts and commissions have, throughout our history, successfully prosecuted persons for violation of the laws of war. This Bill would deprive military courts and commissions of their jurisdiction. The Department of State believes that would be unwise. We believe that the only valid question is whether there is a need for legislation in light of Supreme Court rulings limiting the jurisdiction of military courts in cases where offenses are committed by civilians outside of the territorial jurisdiction of the United States. Some of these problems and uncertainties could better be solved in other ways.

We believe that it may be appropriate to close any jurisdictional gaps and to enact criminal provisions prohibiting certain acts which would constitute violations of the laws of war, e.g. the "grave breaches" of the 1949 Geneva Conventions. However, this Bill does not adequately accomplish either of those purposes and it is so fraught with other difficulties that we strongly urge it not be enacted.

The Office of Management and Budget advises that from the standpoint of the Administration's Program there is no objection to the submission of this report.

Sincerely,

Robert J. McCloskey
Assistant Secretary for
Congressional Relations